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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 98-82
and Competition Act of 1992	)	
	)	
Review of the Commission's	)	
Cable Attribution Rules	)	

COMMENTS

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") has an immediate and substantial interest in the Commission's resolution of its *Notice of Proposed Rulemaking* ("*NPRM*") in this proceeding. The Commission's cable ownership attribution rules are inseparably linked to the ability of wireless cable operators to acquire programming and attract investment capital, and any modification of those rules will bear directly on the wireless cable industry's prospects for emerging as a competitive alternative to cable in local markets.

WCA thus urges the Commission to correct a serious flaw in Section 76.1000(b) that is allowing certain vertically-integrated cable networks to escape their obligations under the program access rules. Both Congress and the Commission have stated that "vertical integration" exists where there is common ownership between a cable operator and a cable programmer. Read literally, however, Section 76.1000(b) abandons the "common ownership" concept and states that vertical integration exists *only* where a cable operator holds an ownership interest in a cable programmer, and not vice-versa.

This flaw in the rule is producing absurd results. For example, the MSNBC cable network is 50% owned by Microsoft, which also holds a $1 billion, 11.5% non-voting interest in Comcast, one of the largest cable MSOs in the United States. Clearly, MSNBC is "vertically integrated" by virtue of Microsoft's common ownership of MSNBC and Comcast. Yet because Section 76.1000(b) does not explicitly state that Microsoft's ownership of *Comcast* is "attributable," MSNBC has argued that it is *not* vertically integrated and therefore is not subject to the program access rules.

WCA submits that this interpretation of Section 76.1000(b) is plainly at odds with the entire rationale behind the current program access statute, *i.e.*, that absent regulation common ownership of cable systems and cable networks will prevent alternative MVPDs from having full and fair access to programming. Accordingly, the Commission should clarify that Section 76.1000(b)'s definition of "attributable interest" applies equally to a programmer's ownership of a "cable operator," and that the program access rules apply to a programmer (*e.g.*, Microsoft) that holds "attributable interests" in a cable operator and a satellite-delivered cable network.

Furthermore, WCA asks the Commission to permit case-by-case review of certain unique and substantial non-ownership relationships between cable operators and allegedly non-vertically integrated cable networks. Upon a proper evidentiary showing, the Commission should classify those relationships as *de facto* "attributable interests" where it is demonstrated that, although direct ownership is not present, the network in question has economic incentives not to sell to cable's competitors. Such an amendment would be entirely consistent with the broad Congressional mandate that the Commission implement the program access statute as necessary to achieve the fundamental objectives of the law. In fact, the Commission recently undertook precisely this sort of review in connection with Fox's proposed investment in the cable-

controlled Primestar DBS service. As shown in that proceeding, it is essential that the Commission retain some sort of mechanism to regulate business relationships that have the same deleterious effect on program access as a *de jure* attributable interest.

Finally, for the reasons set forth in WCA's Comments on the Commission's *Broadcast Attribution Further Notice* and its *Notice of Inquiry* with respect to its 1998 Annual Report to Congress on the status of competition in the video marketplace, WCA reiterates its request that the Commission make legislative recommendations and adopt rule amendments that would eliminate restrictions in the cable-MDS and cable-ITFS cross-ownership and cross-leasing rules that are chilling potential investment in the wireless cable industry.

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COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1/]

I. INTRODUCTION.

The Commission has observed that "[t]he cable attribution rules play a crucial role in the Commission's effort to ensure a competitive, diverse, and fair video marketplace,"[2/] and for that very reason this proceeding is of critical importance to the wireless cable industry. It is beyond dispute that the Commission's cable ownership attribution rules are inseparably linked to the

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[1/] WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment.

[2/] *NPRM* at ¶ 18.

lifeblood of wireless cable operators, *i.e.*, their ability to acquire programming and attract investment capital. By requesting comment on whether and how it should re-evaluate the more restrictive attribution standards that apply to its program access and cable-MDS cross-ownership rules, the Commission has raised issues that will affect the industry's competitive standing for years to come.[3/] WCA thus has a direct and substantial interest in the Commission's resolution of the *NPRM*.

As always, context is crucial here. The *NPRM* has arrived just as both Congress and the Commission are placing a renewed emphasis on promoting facilities-based competition to incumbent cable operators.[4/] Not coincidentally, the wireless cable industry is fast approaching a watershed phase of its ongoing effort to provide that very same competition. Wireless cable operators recently have completed several successful launches of digital wireless cable systems in major markets, and are expanding aggressively into two-way services such as Internet access

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[3/] *Id.* at ¶ 14.

[4/] Just recently, House Telecommunications Subcommittee Chairman Billy Tauzin and Ranking Minority Member Edward J. Markey introduced legislation that would eliminate the "vertical integration" and "terrestrial delivery" loopholes in the current the program access statute. *See* Remarks of U.S. Representative Edward J. Markey, *<http://www.house.gov/markey/pr__vcccact.htm>* (July 29, 1998).; Commission Revised Program Access Enforcement Process, Report No. CS 98-14 (rel. Aug. 6, 1998) [announcing new Commission rules that streamline the program access complaint process and provide program access complainants with a damages remedy]; *Telecommunications Services - Inside Wiring; Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring*, 13 FCC Rcd 3659 [adopting comprehensive cable inside wiring rules which clarify when and how a competing provider may obtain access to the wiring used to serve an MDU resident's individual unit] [the "*Inside Wiring R&O*"].

and data transmission.[5/] Indeed, it is anticipated that the Commission will soon issue comprehensive rules that will enable wireless cable operators and ITFS licensees to provide two-way services on a routine basis.[6/] The fact remains, however, that the wireless cable industry still is having considerable difficulty obtaining full and fair access to programming,[7/] and the industry's overall financial health remains unsettled at best.[8/] The industry's prospects for the future thus depend in no small part on the extent to which the Commission addresses program access and cross-ownership issues with proactive regulation that eliminates artificial barriers to competition.

As WCA has pointed out in prior Commission proceedings, one such artificial barrier is the current cable attribution rule that applies to program access, *i.e.*, Section 76.1000(b) of the Commission's Rules.[9/] It is well settled that Section 628 of the Cable Consumer Protection Act of 1992 (the "1992 Cable Act") applies to "vertically integrated" cable networks, and that

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[5/] *See, e.g.*, Hogan, "GTE Steps Up Marketing Efforts in Hawaii", *Multichannel News*, at 34 (July 20, 1998); Barthold, "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998) [noting, *inter alia*, that BellSouth has launched digital wireless cable systems in New Orleans and Atlanta, and is scheduled to launch additional systems in Orlando, Jacksonville and Daytona]; Kreig, "The New WCAI," *Wireless Voice Video Data*, at 24 (May/June 1998).

[6/] *See Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, 12 FCC Rcd 22174 [the "*Two-Way NPRM*"].

[7/] *See, e.g.*, Comments of The Wireless Communications Association International, Inc., CS Docket No. 98-102, at 7-8 (filed July 31, 1998) [the "WCA Fifth Annual Inquiry Comments"]; Comments of BellSouth Corporation *et al.*, CS Docket No. 98-102, at 7-13 (filed July 31, 1998).

[8/] *See, e.g.*, "CAI Planning to File For Bankruptcy," *Wireless Cable Investor*, at 7 (June 30, 1998); "Wireless Cable On The Brink," *Wireless Cable Investor*, at 1 (Feb. 18, 1998).

[9/] *See, e.g.*, WCA Fifth Annual Inquiry Comments at 9-11.

"vertical integration" exists where there is *common ownership* between a cable operator and a cable network. In this context, "ownership" exists where the owning entity holds an "attributable interest."[10/] When read in conjunction with the Commission's other program access rules, Section 76.1000(b) appears to apply the term "attributable interest" only to a cable operator's level of ownership in a programmer. Unlike the Commission's other cable ownership attribution rules, Section 76.1000(b) does not explicitly apply the term "attributable interest" to an entity's level of ownership in a *cable operator*, and thus some have alleged that the program access rules do not apply to a satellite-delivered cable network owned by an entity that is not itself a "cable operator" but holds a significant ownership interest in a cable MSO. For example, MSNBC is using this reading of the rule to avoid selling to wireless cable operators, even though Microsoft's common ownership of MSNBC and Comcast plainly falls within the statutory concept of "vertical integration."

Not surprisingly, the Commission itself has already rejected this strained interpretation of Section 76.1000(b). Furthermore, the interpretation is inconsistent with the language of the rule, fails as a matter of common sense and is plainly at odds with the entire rationale behind the current program access statute, *i.e.*, that absent regulation, common ownership of cable systems and cable networks will prevent alternative multichannel video programming distributors ("MVPDs") from having full and fair access to programming. Accordingly, for the reasons set forth herein, WCA requests that the Commission put the issue to rest by clarifying that the rule's definition of "attributable interest" also applies to an entity's level of ownership in a "cable

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[10/] 47 U.S.C. 548(b), (c)(2); 47 U.S.C. § 76.1002(a)-(c).

operator," and that where that entity has an "attributable interest" in both a cable operator and a satellite-delivered cable network, that network will be subject to the Commission's program access rules.

Furthermore, consistent with the Commission's broader concern that its cable ownership attribution rules keep apace with recent marketplace developments,[11/] WCA urges that the Commission further amend Section 76.1000(b) to permit case-by-case review of certain unique and substantial non-ownership relationships between cable operators and allegedly non-vertically integrated cable networks, and to permit those relationships to be classified as *de facto* "attributable interests" where it is shown that they provide the network in question with incentives not to sell to cable's competitors. Such an amendment would be entirely consistent with the broad Congressional mandate that the Commission implement the program access statute as necessary to achieve the fundamental objectives of the law. In fact the Commission recently undertook precisely this sort of review in connection with Fox's proposed investment in the cable-controlled Primestar DBS service. Moreover, case-by-case review of the "attributable interest" issue is particularly appropriate given the Commission's recent acknowledgment that a cable operator's market power, not its level of ownership in a cable programmer, is the true source of the program access problem. Simply stated, an "attributable interest" can exist outside the context of stock ownership, and it therefore is essential that the Commission retain some sort of mechanism to regulate program access where a relationship does

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[11/] *See NPRM* at ¶¶ 16-17.

not involve ownership but nonetheless creates similar incentives for cable networks to discriminate against alternative MVPDs.

Finally, for the reasons set forth in WCA's comments on both the Commission's *Broadcast Attribution Further Notice* and its *Notice of Inquiry* with respect to its 1998 Annual Report to Congress on the status of competition in the video marketplace (copies of which are attached hereto as Exhibits A and B, respectively), WCA reiterates its request that the Commission adopt rule amendments and make legislative recommendations that would eliminate restrictions in the cable-MDS and cable-ITFS cross-ownership and cross-leasing rules that are chilling potential investment in the wireless cable industry.[12/] WCA acknowledges that the Commission is not seeking comment on these issues in connection with the *NPRM*, and WCA intends to respect that request.[13/] WCA herein addresses the cross-ownership problem only to respond to the Commission's inquiry as to whether less restrictive ownership attribution rules are appropriate for cable/MDS cross-ownership at this time.[14/]

[12/] *See* WCA Fifth Annual Inquiry Comments at 11-12; Comments of The Wireless Cable Association International, Inc., MM Docket Nos. 94-150, 92-51 and 87-154 (filed Feb. 7, 1997) [the "WCA Cross-Ownership Comments"].

[13/] *NPRM* at ¶ 12.

[14/] *Id.* at ¶ 14.

II. DISCUSSION.

A. *The Commission Should Eliminate the "Gap" in Section 76.1000(b) by Clarifying That The Rule's Definition of "Attributable Interest" Applies To An Entity's Ownership Interest in a "Cable Operator," and That Where An Entity Has An Attributable Interest in Both a Cable Operator and a Satellite-Delivered Cable Network, That Network Will Be Subject to the Commission's Program Access Rules.*

As currently written, the program access provisions in Section 628 of the 1992 Cable Act apply, *inter alia*, to a "satellite cable programming vendor in which a cable operator has an attributable interest."[15/] Significantly, however, at no point in the statute or its legislative history did Congress suggest that Section 628 should apply *only* to those satellite-delivered cable networks that are directly owned in whole or in part by cable MSOs. To the contrary, Congress specifically recognized that the program access problem often arose from "common ownership" of cable systems and cable programming services, which would include a situation where a non-cable entity holds simultaneous ownership interest in a cable operator and a satellite-delivered cable network.[16/] Similarly, in its 1993 *Report and Order* implementing Section 628, the

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[15/] *See* 47 U.S.C. § 548(b) ("It shall be unlawful for . . ., a satellite cable programming vendor in which a cable operator has an attributable interest, . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.) and 47 U.S.C. § 548(c)(2)(A)-(D) (requiring the Commission to adopt regulations which, at a minimum, prohibit a "satellite cable programming vendor in which a cable operator has an attributable interest" from, *inter alia*, refusing to sell to alternative MVPDs, engaging in price discrimination, or entering into exclusive contracts).

[16/] *See* 1992 Cable Act, § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have *common ownership*.) [emphasis added]; H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 41 (1992) ["In the cable industry, vertical integration generally refers to *common ownership* of cable systems and program networks, channels, services, or program production companies."] [emphasis added]; *Implementation of Sections 11*

Commission indicated that the statute's program access provisions were directed toward anticompetitive conduct arising from "combined ownership of cable systems and suppliers of cable programming."[17/]

Accordingly, "*to ensure that all entities with potential incentives to engage in anticompetitive conduct are covered by [the program access] rules,*"[18/] the Commission adopted strict ownership attribution standards for program access that are analogous to those used in the Commission's former video dialtone rules. In so doing, however, the Commission incorporated the ownership attribution standards applicable to its *cable/broadcast* cross-ownership rule, *i.e.*, Section 76.501, but without that rule's exceptions relating to single majority shareholders and properly insulated limited partnerships. Section 76.1000(b) thus reads as follows:

> (b) Attributable interest. For purposes of determining whether *a party* has an "attributable interest" as used in this subpart, the definitions contained in the notes to § 76.501 shall be used, provided however, that:
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> > (1) The single majority shareholder provisions of Note 2(b) to § 76.501 shall not apply and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and

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and 13 of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565, 8583 (1993) [in the context of the FCC's channel occupancy rules, vertical integration refers to "*common ownership* of both programming and distribution systems"].

[17/] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365-6 (1993) [the "*Program Access Report & Order*"].

[18/] *Program Access Report & Order*, 8 FCC Rcd at 3363 (emphasis added).

> (2) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.[19/]

Unfortunately, the language of Section 76.1000(b) has given rise to an interpretation of the rule that *defeats* the Commission's goal of ensuring that "all entities with potential incentives to engage in anticompetitive conduct are covered by [the program access] rules." This is because Section 76.1000(b) does not specifically state that where an entity holds an "attributable interest" in both a cable operator and a cable network, that network is subject to the program access rules.[20/] As a result, it has been suggested that the program access rules do not apply to any satellite-delivered cable network owned by an entity that also holds a substantial ownership interest in a cable MSO, since Section 76.1000(b) read literally only applies if the cable operator itself holds an attributable interest in the cable network.

WCA's concerns here are by no means hypothetical: this strained interpretation of Section 76.1000(b) is the entire basis of MSNBC's refusal to sell to wireless cable operators and other alternative MVPDs. As the Commission is aware, MSNBC is 50% owned by Microsoft,

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[19/] 47 C.F.R. § 76.1000(b).

[20/] Moreover, Sections 76.1001 and 76.1002, which identify the types of programmers covered by the program access rules, only use the term "attributable interest" in connection with a cable operator's level of ownership in a programmer. *See* 47 C.F.R. § 76.1001(b) [No cable operator, *satellite cable programming vendor in which a cable operator has an attributable interest*, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices . . . ."] [emphasis added] and, *e.g.*, 47 C.F.R. § 76.1002(a) ["*No cable operator that has an attributable interest in a satellite cable programming vendor* or in a satellite broadcast programming vendor shall unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms and conditions for the sale of, satellite cable programming . . . ."] [emphasis added].

which also holds a $1 billion, 11.5% non-voting stock interest in Comcast, one of the largest cable MSOs in the United States. If Section 76.1000(b) were interpreted in the same manner as Section 76.501 (the rule on which Section 76.1000(b) is based), Section 76.1000(b)'s definition of "attributable interest" would be applied to Microsoft's interest in Comcast, and thus ownership of Comcast's cable systems would be attributed to Microsoft.[21] In turn, since Microsoft's 50% ownership in MSNBC is an "attributable interest" as well, MSNBC would qualify as a satellite-delivered cable programming service in which a "cable operator" holds an attributable interest, and thus would be subject to the Commission's program access rules.

It is WCA's understanding, however, that MSNBC has adopted a different interpretation of the rule that not surprisingly exempts MSNBC from any program access obligations whatsoever. Under MSNBC's reading of the rule, since Section 76.1000(b) does not explicitly state that the rule's definition of "attributable interest" applies to Microsoft's interest in Comcast, ownership of Comcast's cable systems cannot be attributed to Microsoft and thus MSNBC is not covered by the Commission's program access rules. In effect, MSNBC is arguing that Section 76.1000(b) abandons the principle of cable ownership attribution altogether, and that the rule therefore permits Microsoft to protect its cable investments by refusing to sell its programming to cable's competitors.

At the outset, it must be emphasized that the Commission itself has confirmed that MSNBC's interpretation of Section 76.1000(b) is wrong. Stripped to its essence, MSNBC's

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[21] This is because Microsoft's 11.5% non-voting stock interest in Comcast exceeds Section 76.1000(b)'s 5% threshold for non-voting stock.

position is that vertical integration exists where a cable operator has an ownership in a satellite-delivered cable network, but not where a programmer (*e.g.*, Microsoft) has an ownership interest in a cable operator (*e.g.*, Comcast). The Commission, however, has stated otherwise: "Vertical integration occurs where a cable system (a video programming service distributor) has an ownership interest in a video programming service supplier *or vice versa.*"[22/]

Moreover, the idea that Section 76.1000(b)'s definition of "attributable interest" does not apply to ownership interests in cable operators simply cannot be squared with the rule's cross-reference to Section 76.501. Note 2 to Section 76.501 clearly states that Section 76.501's attribution benchmarks apply to ownership interests in cable operators, and there is nothing in the Commission's *Program Access Report & Order* which suggests that the Commission intended to leave that portion of Note 2 aside when it incorporated Section 76.501 into Section 76.1000(b).[23/] Indeed, the Notes to Section 76.1000(b) indicate that the only portions of Note 2 not incorporated into Section 76.1000(b) *are the exceptions relating to single majority shareholders, properly insulated limited partners and non-voting stock.* That the Commission otherwise incorporated Note 2 in its entirety is, in WCA's view, persuasive evidence that the Commission did not intend to exclude attributable interests in cable operators from the scope of Section 76.1000(b).

[22/] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1122 n.550 (1998), *citing Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4429 n.398 (1997).

[23/] *See* 47 C.F.R. § 76.501, Note 2 ("In applying the provisions of this section, ownership and other interests in broadcast licensees *and cable television systems* will be attributed to their holders and deemed cognizable pursuant to the following criteria . . . .") [emphasis added].

Furthermore, MSNBC's interpretation of Section 76.1000(b) fails as a matter of common sense. Comcast is a publicly traded, widely held company, and thus it is conceivable that Microsoft could acquire effective control of the company by purchasing a majority or even a sufficiently large minority voting stock interest. Under those circumstances, presumably even MSNBC would be forced to acknowledge that Microsoft would qualify as a "cable operator" under the program access rules, and that MSNBC would be subject to program access obligations.[24/] MSNBC thus cannot sensibly argue that Section 76.1000(b)'s definition of "attributable interest" does not apply to ownership interests in cable operators, since under that theory Comcast's cable systems would *never* be attributable to Microsoft even where the latter's investment rises to the level of "control."

The case of Time Warner represents another example of why MSNBC's reading of the rule cannot withstand scrutiny. Time Warner currently holds its cable systems and the Turner satellite-delivered cable networks in separate "first-tier" subsidiaries, *i.e.*, Time Warner Entertainment ("TWE") and Turner Broadcasting, respectively. Yet Time Warner would not seriously argue that the Turner cable networks are exempt from the program access rules simply because Section 76.1000(b) does not explicitly state that Time Warner's 100% ownership of TWE's cable systems is attributable.[25/]

[24/] It should be noted, however, that even here Section 76.1000(b) leaves the issue in doubt, since the rule does not explicitly state that the term "attributable interest" applies to an ownership interest in a cable operator.

[25/] *See also*, Higgins, "Murdoch/Malone May be Primestar's Prime Stars," *Broadcasting/Cable*, at 6-7 (August 10, 1998) [discussing "parallel" ownership of TCI cable systems and Liberty cable networks].

Thus, what MSNBC actually appears to be arguing is that Section 76.1000(b) only applies where a programmer has a *controlling* interest in a cable operator. That position, however, is unsupported by the legislative history of the program access statute. Congress expressly considered and overwhelmingly rejected a program access amendment that only would have been applicable to situations where a cable operator and a cable network are under common control. Section 628 of the 1992 Cable Act originated with H. Amdt. 743, an amendment to H.R. 4850 offered on the floor of the House by Rep. Billy Tauzin. A substitute amendment, H. Amdt. 744, was offered at the same time by Rep. Manton. Rep. Tauzin's explanation of the differences between his amendment and that of Rep. Manton speaks volumes:

> Why is our amendment preferable to the amendment of the gentleman from New York . . . I have called [the Manton [substitute] an amendment drafted for and by the cable industry. . . . It is weaker . . . in terms of who it covers, because it sets a new legal standard of what companies are covered, . . ., *a standard of control rather than affiliation,* and it is much weaker in who it covers, so that more of the big companies can escape its coverage.[26/]

Rep. Tauzin's amendment -- an amendment which repudiated "control" as the benchmark for determining which programmers would be subject to program access restrictions - - was overwhelmingly adopted by a 338-68 recorded vote in the House, while the Manton amendment was rejected. Rep. Tauzin's approach was subsequently incorporated into the 1992 Cable Act by the conference committee.[27/] Accordingly, it is not surprising that in implementing Section

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[26/] 138 Cong. Rec. At H 6534 (daily ed. July 23, 1992) [statement of Rep. Tauzin] [emphasis added].

[27/] *See* H.R. Rep. No. 102-862, 102d Cong., 2d Sess. at 93 (1992) [the "Conference Report"].

628, the FCC rejected calls from the cable industry for a "control" standard, and instead set a 5% ownership interest as the benchmark for determining when an entity has an "attributable interest" in a cable operator and a satellite-delivered cable network.

In sum, the above-described "gap" in Section 76.1000(b) threatens to produce the very result Congress intended to avoid when it applied Section 628's program access restrictions to entities that hold simultaneous ownership interests in cable operators and satellite-delivered cable networks. As recently noted by the Commission:

> The program access provisions of the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market by providing greater access to cable programming services. . . Congress found that the cable industry was significantly vertically integrated, *i.e.*, cable systems and programmers are often commonly owned, and vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.[28/]

The scenario feared by Congress is precisely what has happened with respect to MSNBC: in the name of protecting its substantial investment in Comcast, Microsoft to this day refuses to make MSNBC available to wireless cable operators and other alternative MVPDs. This result not only runs in direct opposition to what Congress was trying to achieve in Section 628, but is an invitation for other programmers to structure their relationships with cable operators in a similar manner and thereby argue that they are exempt from the program access statute as well. There is no public interest rationale for the Commission to promote this result. WCA thus urges

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[28/] *Outdoor Life Network and Speedvision Network*, DA 98-1241, at ¶ 10 (CSB, rel. June 26, 1998).

the Commission to exercise the broad discretion granted to it by Congress and clarify that Section 76.1000(b)'s definition of "attributable interest" applies to an entity's ownership interest in a "cable operator," and that where an entity has an attributable interest in a cable operator and a satellite-delivered cable network, that network is subject to the Commission's program access rules.[29/]

B. *The Commission Should Amend Section 76.1000(b) To Provide That The Commission Shall Have the Discretion To Determine Whether Certain Unique and Substantial Non-Ownership Relationships Rise To the Level of A "De Facto" Attributable Interest.*

The Commission recently advised Congress that cable's market power, not "vertical integration," is the true source of the program access problem.[30/] It thus cannot be emphasized enough that over the past two years consolidation among cable operators has accelerated to a near-frenetic pace, further tightening the major cable MSOs' long-standing stranglehold over

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[29/] *See, e.g.,* Conference Report at 93 ("In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable.").

[30/] Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (Jan. 23, 1998) ["It is probably fair to say that the general conclusion is that any analysis *should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself.*"] [emphasis added]; *see also Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996) ["As already recognized by the Commission, concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct."].

distribution of video programming in local markets.[31] Further aggravating the problem is the recent wave of joint ventures between these ever-growing cable MSOs and owners of cable networks. The net result is that programmers are becoming even more closely aligned with the very same cable operators whose stranglehold on local distribution is critical to the success of any programming service.[32] It therefore is no surprise that a number of cable networks that are not owned by cable operators are nonetheless behaving *like* vertically-integrated programmers and refusing to sell their product to alternative MVPDs.[33]

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[31] *Fourth Annual Report*, 13 FCC Rcd at 1109 (noting that cable retains an 87.1% share of local markets, and that cable's "HHI" of 7567 "remains several times greater than the 1800 threshold at which a market may be considered 'highly concentrated'"); *id.* at 1115-1116 (noting a substantial trend toward regional "clustering" of cable systems by large cable MSOs); *1996 Competition Report*, 12 FCC Rcd at 4423 ("In all but a few markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.").

[32] *See, e.g.*, Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-141, at 3-10 (filed July 23, 1997).

[33] As identified by the Commission, such services include Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television, and TV Land. Kennard Letter, Responses to Questions at 1. As discussed in WCA's pleadings with respect to the Commission's ongoing review of Fox's proposed investment in Primestar, Fox News is a particularly telling example of how large cable MSOs are able to "persuade" a programmer into signing cable-exclusive contracts even where the MSOs hold no stock ownership in the programmer. *See, e.g.*, WCA Petition to Deny or, Alternatively, Request for Imposition of Conditions re: FCC File No. 106-SAT-AL-97, at 14-15 (Sept. 25, 1997). Also, *see* Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 6 (Dec. 18, 1997) ["[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS) which create exclusivity, and cable and satellite programmers (Murdoch) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagramed with all of its equity, licensing, carriage agreements, and *quid pro quo* relationships, creates a web which has the effect of ensnaring all competitors."].

Accordingly, as WCA has previously argued before the Commission, the marketplace reflects that there are and will continue to be relationships between cable operators and programmers that fall outside the letter of Section 76.1000(b) but have the same prohibitive effect on an alternative MVPD's ability to acquire programming. These relationships remain beyond the reach of the program access rules only because Section 76.1000(b) defines an "attributable interest" solely in terms of stock or partnership interests, and thus does not encompass the broad variety of business relationships between cable operators and programmers which have a demonstrable anticompetitive effect on cable's competitors. Since, however, the program access statute leaves the definition of "attributable interest" entirely within the Commission's exclusive discretion, the Commission has the authority to address this problem *now* by amending Section 73.1000(b) to permit case-by-case review of unique and substantial non-ownership relationships between cable operators and allegedly non-vertically integrated cable networks, and to permit those relationships to be classified as *de facto* "attributable interests" where it is shown that they provide the network in question with comparable incentives not to sell to cable's competitors.[34/]

WCA wishes to stress that it is *not* asking the Commission to adopt rules in this proceeding that abandon the "attributable interest" requirement in Section 628 of the 1992 Cable Act, nor is it suggesting that *any* non-ownership relationship between a cable operator and a

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[34/] A possible model for such an amendment is the ownership attribution standard used in the Commission's former cable-telco cross-ownership rule, which encompassed a series of specified non-stock relationships. *See* 47 C.F.R. § 63.54(c), Note 1 (identifying debtor/creditor relationships, common management and "any element of financial interest" as "attributable").

programmer should qualify as an "attributable interest." Rather, WCA is merely asking that the Commission exercise the broad discretion given to it by Congress and ensure that its program access rules are flexible enough to address anticompetitive conduct that stems not only from common ownership of cable systems and cable networks, but from other relationships between cable operators and programmers that have the same effect.[35/]

Indeed, this is precisely what the Commission has done on its own motion in connection with its review of Fox's proposed investment in the cable-controlled Primestar DBS service.[36/] Moreover, the relief requested by WCA here is limited: WCA is asking that case-by-case review be available only where the affected MVPD sustains a *prima facie* case that the non-stock relationship in question is both substantial and unique, and equates to a *de jure* "attributable interest" *vis-a-vis* the incentives it provides a programmer not to sell to cable's competitors. Under this proposal, the Commission would retain full discretion to establish whatever burdens of proof and procedural requirements are necessary to give full effect to Congressional intent *without* exposing cable operators or programmers to fishing expeditions or frivolous complaints. WCA submits that this is the fairest and most efficient way to ensure that the Commission maintains at least *some* regulatory authority to review exceptional cases which, as in the case of

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[35/] *Cf. ASTV v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995), *quoting Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990) [inquiry as to Congressional intent must continue to "the language and design of the statute as a whole"].

[36/] *See* Letter from Regina M. Keeney, Chief, International Bureau re: FCC File Nos. 91-SAT-TC-97 and 106-SAT-AL-97, at 3 (March 2, 1998) (requesting that Primestar MSO owners provide a detailed description of business arrangements between non-vertically integrated cable networks and cable systems, and to describe their policy and practice with respect to exclusive contracts).

Fox's investment in Primestar, pose a material threat to full and fair program access for alternative MVPDs.

C. *More Relaxed Ownership Attribution Standards for Cable-MDS Cross-Ownership Are Both Appropriate and Necessary At This Time.*

WCA fully agrees with the Commission's tentative conclusion that the current cable-MDS cross-ownership rule "severely restricts investment opportunities that are compatible with the Commission's goal of strengthening wireless cable and providing meaningful competition to cable operators."[37/] Under that rule's current ownership attribution benchmarks, a prohibited cross-ownership is created by as little as a 5% or greater voting *or* non-voting stock interest in a wireless cable operator. Moreover, unlike the cable-MDS and cable-ITFS cross-leasing rules, Section 613(b) of the 1992 Cable Act does not allow the cable-MDS cross-ownership rule to be waived for good cause.[38/] As a result, the cable-MDS cross-ownership rule chills potential investment in the wireless cable industry by institutional investors or venture capital firms who have already invested in or would like to invest in the cable industry.

Recently, for example, Blackstone Management Associates was required to obtain a temporary waiver of the cable/MDS cross-ownership and cable/ITFS cross-leasing rules in order to acquire a limited partnership interest in a joint cable venture with Time Warner *and* retain its

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[37/] *Broadcast Attribution Further Notice* at ¶ 44. In deference to the Commission's request that commenting parties not reiterate arguments already made in other proceedings on the issue of cable-MDS cross-ownership, WCA herein incorporates its Broadcast Attribution Further Notice Comments and its Fifth Annual Inquiry Comments by reference. WCA is addressing this issue here only to respond to the Commission's more general inquiry as to whether less restrictive ownership attribution standards are appropriate for cable-MDS cross-ownership at this time. *See NPRM* at ¶ 23.

[38/] *See* Exhibit A at 7-12.

15% ownership interest in wireless cable operator People's Choice TV Corp.[39/] The Commission required Blackstone to divest some of its interests in the joint cable venture within 12 months, even though the number of subscribers at issue and the size of the prohibited cable/MDS overlap were relatively small when compared to the entire size of the transaction. Yet, as the Commission has already recognized in the broadcast context, an investor such as Blackstone cannot exercise managerial and/or operational control over cable and wireless cable systems in the same market. Simply put, it makes little sense to require divestiture of overlapping cable and wireless cable properties under these circumstances.

Accordingly, WCA has requested that the Commission apply its proposed broadcast ownership attribution criteria to the cable/MDS cross-ownership rule, so that only voting stock interests of 10% or greater (20% or greater for "passive" investors) would remain attributable.[40/] In addition, to fully maximize opportunities for investment in the wireless cable industry, WCA has also recommended that the Commission *not* apply its proposed 33% "equity or debt plus" broadcast attribution standard to the cable-MDS cross ownership rule. As noted above, the Commission adopted (and Congress subsequently codified) the cable-MDS cross-ownership rule

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[39/] *See, e.g., Letter to Blackstone Management Associates II, L.L.C. from Roy J. Stewart, Chief, Mass Media Bureau (1800E1-AL)* (April 10, 1996) [requiring Blackstone Management Associates to obtain a temporary waiver of the cable/MDS cross-ownership and cable/ITFS cross-leasing rules in order to acquire a limited partnership interest in a joint cable venture with Time Warner and retain its 15% ownership interest in wireless cable operator People's Choice TV Corp.].

[40/] WCA Broadcast Attribution Further Notice Comments at 6-9. WCA also has asked the Commission to recommend that Congress amend the statutory cable-MDS cross-ownership ban to provide for "good cause" waivers and a rural exemption for any nonurbanized area of fewer than 10,000 persons. *Id.* at 12; Exhibit B at 11-12.

not to preserve diversity of broadcast programming, but to ensure that cable operators would not delay competition by warehousing MDS spectrum. Furthermore, the Commission has otherwise offered no rationale for its apparent suggestion that cable-MDS cross-ownership becomes anticompetitive when an investor holds a 33.1% passive ownership interest in overlapping cable and wireless cable properties.

For purposes of *this* proceeding, WCA wishes to reemphasize that it continues to believe that less restrictive ownership attribution standards are both appropriate and necessary in the cable-MDS cross-ownership context. While anticompetitive warehousing of wireless cable spectrum by incumbent cable operators remains a legitimate concern, there is no evidence that the current rule or WCA's proposed liberalization thereof increases the risk that incumbent cable operators will obtain control over wireless cable channels in their own markets.[41/] Conversely, there *is* evidence that the rule is having a prohibitive effect on an institutional investor's ability to put money into the wireless cable industry, and that the rule therefore is having a material and immediate adverse impact on the ability of wireless cable operators to raise capital that is essential for launch and operation of competitive digital wireless cable systems with two-way capability. WCA thus submits that in light of the broader pro-competitive objectives expressed in the *Broadcast Attribution Further Notice*, the balance of equities and the public interest

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[41/] This is *not* the case, however, with respect to program access, where it has been demonstrated time and again that Section 76.1000(b)'s current ownership attribution standard does not prevent anticompetitive behavior by cable-affiliated programmers, and that liberalization of the standard would only serve to worsen the problem. Thus, a *more* restrictive ownership attribution standard remains appropriate and necessary to ensure that the Commission's program access rules remain consistent with Congressional intent.